CLARK FORK BASIN WATERSHED MANAGEMENT PLAN - SUMMARY REPORT

Concern over water availability led the 2001 Montana Legislature to pass House Bill 397, creating a task force to develop a water management plan for the Clark Fork River basin. The legislature directed the task force to draft a plan that (1) i*dentifies options to protect the security of water rights; (2) provides for the orderly development of water; and (3) provides for the conservation of water in the future.* The task force was also required to examine existing laws, rules, plans, and policies affecting water management in the Clark Fork River basin.

In addition to addressing the three mandatory tasks, the *Clark Fork Basin Water Management Plan* includes a vision statement to guide water management in the Clark Fork basin, a profile of each basin watershed, a summary of economic and demographic trends in the basin, a summary of the legal framework for managing water, a summary of the existing legal and regulatory constraints on basin water management.

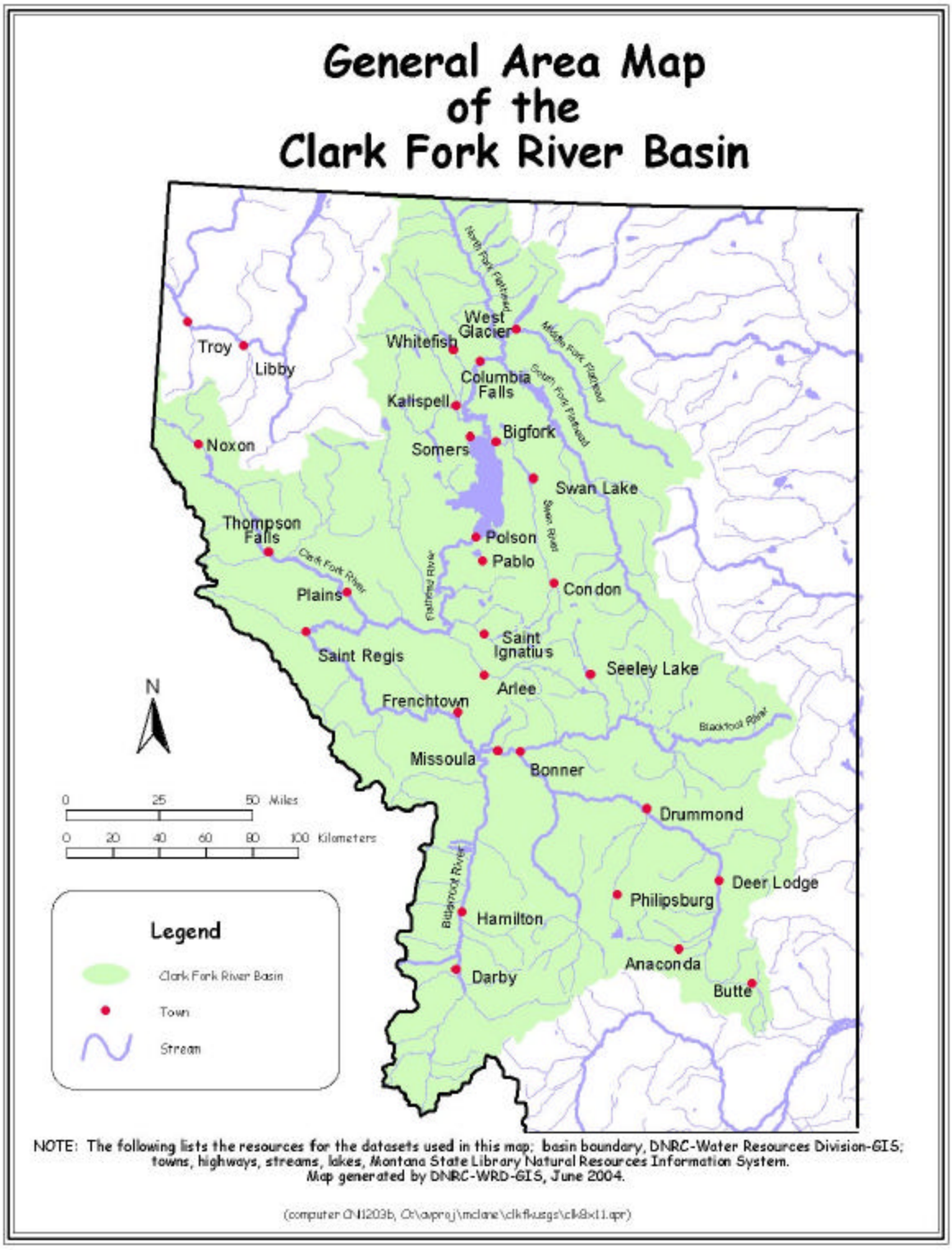
This report summarizes the findings and recommendations developed by the Clark Fork River Basin Task Force. The full draft plan is available on the Internet at www.dnrc.state.mt.us/clarkfrkbasincover.htm. Copies can also be requested from the Montana Consensus Council, 1301 Lockey, Suite 301, Helena, MT 59620; phone: 406-444-4457.

Hydropower Water Rights and Basin Water Use

Water users in the Clark Fork basin face a problem that has not been resolved. Given existing laws, hydropower and other senior water rights pose a potential constraint on junior water rights, and on water available for future use in the basin. The risk that these constraints will actually be imposed is unknown. As of May 2004, hydropower right holders in the basin have not objected to new permit applications, nor have they made a call on junior water right holders. But they could, and ongoing changes in the basin may make it more likely that they will.

Avista Corporation holds hydropower water rights for its Noxon Rapids Dam on the Clark Fork River near the Idaho border. These rights may pose a limitation on the water available for future use in the basin upstream. Avista's water rights total 50,000 cubic feet per second, almost all of the flows leaving the basin. These rights are filled on average only 8 percent of the time, predominantly during May and June. This suggests that surface water (and groundwater connected to surface water) is legally available for future appropriation in the basin only during the period when Avista's water rights are filled. Also, all water users with rights junior to Avista and the hydropower rights at two PPL Montana dams (Kerr and Thompson Falls) appear to be at risk much of the time.

Given this situation, we face a choice. We can continue to ignore the potential constraints posed by hydropower water rights. Or we can explore possible strategies to address the issue.



MAP CAPTION: Measured by discharge volume where it leaves the state, the Clark Fork is Montana's largest river. The river and its tributaries drain 21,833 square miles, with a mean annual discharge of 20,504 cubic feet per second or 14,818,240 acre feet.

The task force identified several options that would either eliminate the potential constraints posed by the hydropower water rights or allow continued water development in the face of them. Those options include:

- Water Marketing - Individuals or political subdivisions can purchase existing water rights from willing sellers and convert them to new uses. Even if new water rights are available, however, water right purchases likely will occur because any new economic activity dependent on water use probably could not be based on the basin's most junior water right. The risk that use of this junior water right would be interrupted would be too high.
- Contracting for Water from Hungry Horse Reservoir - Under certain conditions, public entities such as irrigation districts and state and local governments and individuals can contract with the U.S. Bureau of Reclamation (USBR) for water stored in the reservoir. The contracts may provide water over a long-term period or for temporary service on an annual basis. Long-term contracts are restricted to public entities with taxing authority. The availability of these contracts may be restricted by reservoir operating constraints including flood control, fish and recreation, and the biological opinion on salmon arising from the federal Endangered Species Act. The price of water provided under any contract would have to be negotiated with USBR.
- Basin Closure - Over appropriated basins can be closed to the issuance of new water rights. A closure would eliminate the need for existing basin water rights holders to spend time and money objecting to new uses because no additional water is legally available. In a closed basin, water users could obtain water for new uses through water marketing, contracting for stored water, or condemning existing rights.
- Subordination of Hydropower Rights - The State might require hydropower water rights to be subordinated to other water uses and thereby eliminate the hydropower water rights holders' opportunity to make call on junior users and to object to new water right permits and changes. This action would require payment by the State to the utility for the subordinated rights, probably through a condemnation action.
- Condemnation of Existing Rights - By law, municipalities may condemn existing water rights for public purposes. Any rights condemned would be purchased at fair market value. The State might provide the condemnation opportunity if the State had condemnation authority. This has not been established.
- Opportunity to Object to Hydropower Water Rights – Existing water rights holders may object to the hydropower water rights and seek to demonstrate that they are not valid in the ongoing legal process which is adjudicating all pre-1973 water rights.

TASK FORCE RECOMMENDATIONS

The task force identified the following options and recommendations for watershed management in the Clark Fork River basin. Chapter numbers and titles correspond to the draft watershed management plan.

Chapter 6 - Hydropower Water Rights and Basin Water Use

6-1 The State of Montana should open discussions with the U.S. Bureau of Reclamation to determine the availability and cost of temporary and long-term contracting options, and to determine a quantity of firm storage available from Hungry Horse Reservoir for water use in Montana.

Chapter 7 - Options to Protect the Security of Water Rights

For water rights to be secure, several conditions must be met. The rules governing water allocation must be predictably applied, and the rules themselves must be unchanging. The process for enforcing water rights must be timely and affordable. And new water uses cannot impair existing uses.

7-1 The State of Montana should complete the state-wide adjudication of water rights by:

- Establishing a reasonable goal, such as 5 years, for achieving enforceable water rights decrees in the Clark Fork Basin.
- Providing additional resources for the adjudication process by:
  - Providing additional funding for the Water Court and DNRC; and
  - Prioritizing DNRC resources to focus on the adjudication.

7-2 All reasonable efforts should be made to ensure that the adjudication results in durable and accurate water rights. Two options for improving the accuracy of the water rights adjudication are:

- The Montana Water Court could formally announce that it will examine claims with DNRC issue remarks to which no objections have been filed and resolve those it finds to be inaccurate.
- An institutional objector such as DNRC or the Montana Attorney General could be empowered and funded by the legislature to examine claims and to object to those found to be inaccurate. Funding must be sufficient for the number and complexity of the claims to be examined.

7-3 The State of Montana and the Confederated Salish and Kootenai Tribes should move as rapidly as possible to resolve the status of tribal reserved water rights through negotiation or litigation.

7-4 The legislature and the DNRC should work together to ensure that the DNRC has adequate funding and staffing to carry out its water related responsibilities in a prompt and efficient manner.

7-5 The State of Montana should act to reduce the burden on existing water rights holders to protect their rights through:

- Direction from the Montana Legislature to DNRC to investigate and enforce water rights.

- Direction from the Montana Legislature to DNRC to provide mediators to resolve water right disputes.
- Administration by DNRC of a program that trains, selects, and evaluates water commissioners.
- Sharing the cost of water commissioners by all rights holders according to their share of the total basin water rights rather than just those receiving water.

7-6 The Montana Legislature should explicitly authorize judges to award attorney fees to a private party bringing a successful action against an illegal use of water when diversions are made without a water use permit or existing water right.

7-7 DNRC should expeditiously complete the rules it is currently developing to establish criteria for objecting to water rights permit and change applications that increase the burden on applicants, while reducing the burden on existing rights holders.

Chapter 8 - Options for the Orderly Development of Water

The orderly development of water requires a process for quantifying the physical availability of water, and providing for its use by the various competing existing and future users. To accomplish these ends, the task force identified the following regulatory, management, and research and education strategies.

8-1 While the adjudication does not determine either the legal or physical availability of water for future appropriations, full knowledge of water rights cannot exist until the adjudication is complete. Also, additional water development may be at risk to future adjudicatory rulings by the Water Court, particularly in the Flathead and Blackfoot sub-basins in which preliminary decrees have not been issued. The adjudication should, therefore, be completed

8-2 DNRC should change the water rights permitting requirements and process by:
- Requiring an evaluation of cumulative impacts before granting surface or groundwater permits.
- Adding two public interest criteria to the issuance of new water right permits:
  - The effects on the quantity and quality of the source of supply for existing beneficial uses; and
  - The availability and feasibility of using low-quality water for the purpose for which the permit application has been made.

8-3 The regulation and management of surface and groundwater should conform to the legal standard that water is a unitary resource by:
- Eliminating the 35 gpm/10 acre-feet exemption to allow the state the means to track groundwater development, ensure that it does not affect other groundwater users, and improve the efficiency of the use of groundwater.

- Developing a legally defensible definition of a hydrologic connection between surface and groundwater.
- Requiring applicants for a groundwater permit to provide information demonstrating the nature of the surface-groundwater connection.

8-4 Assuming that leasable water is available, the State of Montana should issue water leases as well as new water right permits to allow new water developments.

8-5 The State of Montana should explore and develop appropriate rules for authorization and management of groundwater augmentation to enhance basin water supplies or recharge groundwater resources.

8-6 The Legislative Water Policy Committee should be re-established to increase the focus on water issues and water education for legislators.

8-7 The Legislature should appoint interim committees to consider:
- The ongoing water rights adjudication; and
- Establishing specialized water courts to oversee water administration instead of relying district courts.

8-8 Single- and multi-purpose organizations such as conservancy or irrigation districts that can manage or participate in the management of water quantity should be created when they would be effective at the scale at which the management would occur.

8-9 Individual and water user organizations should provide for water use by existing and future users by:
- Examining options for increasing water use through use of high spring flows and snow melt (rain on snow events);
- Increasing water storage;
- Identifying and managing areas where return flows are important;
- Continuing to use water leasing and water marketing as management tools; and
- Protecting and rehabilitating wetlands through active floodplain and wetland management, bank storage, etc.

8-10 Additional research is needed to:
- Evaluate the availability of the basin's groundwater, its recharge rate, and groundwater-surface water interrelationships.
- Define more accurately sub-basin hydrology and water, biological, and economic relationships.
- Study water availability to identify places of stress and the impacts of sewer system installations on water quality.

8-11 Ongoing monitoring of stream flow, groundwater, and snow pack is critical to both research and water management. Funding should be provided to state and federal agencies to continue this monitoring.

Chapter 9 - Options for Conserving Water

Water conservation means the long-term, sustainable use of water resources. Water can be used beneficially in-stream or off-stream. Water can be conserved by preserving the qualities that maintain in-stream uses as well as those that allow long-term sustained use for off-stream uses. The task force identified the following strategies for conserving water.

9-1 Cities and counties should use their zoning and subdivision review powers to:

- Protect areas in which surface waters recharge groundwater.
- Require water meters in new subdivisions and government-owned water systems.
- Promote conservation through adoption of model conservation ordinances that regulate water use during periods of a water distribution shortfall.

9-2 DNRC should help to promote water conservation by:

- Improving its system for handling and managing water data to make the data more accessible to the public.
- Requiring measurement of water use for new water permits and change authorizations.
- Reaching agreement with DEQ to coordinate information required from groundwater pump tests.

9-3 Pursuant to the mandate of its organic act, the USFS should optimize favorable flow conditions in its management.

9-4 Individuals and water user organizations should take additional actions to provide for the long-term, sustainable use of water by:

- Measuring water uses and diversions;
- Improving water conveyance efficiency;
- Managing groundwater provided by irrigation;
- Identifying, managing, and protecting areas in which surface waters recharge groundwater; and
- Managing the supply side, e.g., using artificial recharge.

9-5 Individuals, organizations, and, where appropriate, government agencies should work together to form sub-basin planning entities which in turn can and should develop and implement drought plans targeted at the objectives of local water users.

9-6 Government agencies and water user organizations should provide long-term, coordinated education for water users, including information about activities that might affect groundwater recharge and quality and the connection between wasting water and wasting electricity.

9-7 Specific research topics that should be pursued include:

- The connection between groundwater infiltration and base stream flow;
- The connection between the basin vegetation and base flow;
- Quantification of water conservation activities; and
- The 7-day average low flow in a 10-year period (sometimes known as 7Q10).

Chapter 10 - Plan Implementation

10-1 The Task Force mandate should be continued and explicitly extended by the legislature to include continuing implementation oversight and evaluation of the Clark Fork River Basin watershed management plan.

10-2 The Task Force should be provided an annual budget of $15,000 to carry out its mandate.

Clark Fork Basin Task Force Members

HB 397 provided that the task force must include representatives of all watersheds and viewpoints within the basin. Members and their contact information are listed below.

Matt Clifford, Clark Fork Coalition
Elna Darrow, Flathead Basin Commission
Jim Dinsmore, Granite Conservation District and Upper Clark Fork River Basin Steering Committee
Marc Spratt, Flathead Conservation District
Steve Fry, Avista Corp.
Holly Franz, PPL Montana
Harvey Hackett, Bitter Root Water Forum
Fred Lurie, Blackfoot Challenge
Eugene Manley, Granite County
Gail Patton, Sanders County Commission
Bill Slack, Joint Board of Control
Jay Stuckey, Green Mountain Conservation District
Phil Tourangeau, Confederated Salish and Kootenai Tribes